

APPEAL NO. 180066
FILED FEBRUARY 26, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 21, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to right cubital tunnel syndrome; (2) the compensable injury of (date of injury), does not extend to aggravation to disc herniation at L5-S1, lumbar radiculopathy, and left hip SI joint; (3) the appellant/cross-respondent (claimant) had not reached maximum medical improvement (MMI) as of the date of certification on August 16, 2017; and (4) because the claimant has not reached MMI, an impairment rating (IR) cannot be assigned.

The claimant appealed that portion of the ALJ's extent-of-injury determination that the compensable injury does not extend to aggravation to disc herniation at L5-S1, lumbar radiculopathy, and left hip SI joint. The respondent/cross-appellant (carrier) responded, urging affirmance of the extent-of-injury determination disputed by the claimant. The carrier appealed, disputing that portion of the ALJ's extent-of-injury determination that the compensable injury of (date of injury), extends to right cubital tunnel syndrome. Additionally, the carrier is disputing the ALJ's determination that the claimant had not reached MMI as of the date of certification on August 16, 2017; and because the claimant had not reached MMI, an IR cannot be assigned. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed as reformed.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury); the carrier has accepted a right shoulder partial thickness rotator cuff tear and a lumbar sprain/strain as the compensable injury; and (Dr. S) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) as designated doctor on the issues of extent of injury, MMI, and IR. The claimant testified that he was injured when trying to catch a piece of equipment that had slipped.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be

clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), does extend to right cubital tunnel syndrome but does not extend to aggravation to disc herniation at L5-S1, lumbar radiculopathy, and left hip SI joint is supported by sufficient evidence and is affirmed.

MMI/IR

Section 401.011(30)(A) provides that MMI is the "earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary.

The ALJ correctly noted in her discussion of the evidence that (Dr. H), a carrier-selected required medical examination doctor, examined the claimant for a second time on August 16, 2017, and certified that the claimant had not reached MMI but that this report was not adoptable because Dr. H considered non-compensable conditions.

The ALJ found that the preponderance of the other medical evidence is not contrary to the last certification from Dr. S that the claimant had not reached MMI. That finding is supported by sufficient evidence. However, the ALJ mistakenly listed the date of the examination and certification as August 16, 2017. The evidence reflects that the date of the last examination of the claimant for purposes of MMI and IR from Dr. S in evidence is April 14, 2017. In evidence is a Report of Medical Evaluation (DWC-69) which reflects that Dr. S examined the claimant on April 14, 2017, and certified on April 21, 2017, that the claimant has not reached MMI. In the accompanying narrative, Dr. S noted that further material recovery from or lasting improvement could reasonably be anticipated for the compensable lumbar sprain/strain and right cubital tunnel syndrome conditions. Dr. S further stated that the claimant could benefit from additional conservative care. Accordingly, we reform the ALJ's determination that the claimant had not reached MMI as of the date of the certification, April 21, 2017, to conform to the evidence.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), does extend to right cubital tunnel syndrome but does not extend to aggravation to disc herniation at L5-S1, lumbar radiculopathy, and left hip SI joint.

We affirm as reformed the ALJ's determination that the claimant had not reached MMI as of the date of the certification on April 21, 2017.

We affirm the ALJ's determination that because the claimant had not reached MMI, an IR could not be assigned.

The true corporate name of the insurance carrier is **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge